No. 06-581

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In the

Supreme Court of the United States

ALLEGRETTI & COMPANY,

Petitioner,

v.

IMPERIAL COUNTY, CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeal of California, Fourth Appellate District, Division One

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF ALLEGRETTI & COMPANY'S PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. When property owners' right of access to water beneath their own land is substantially abrogated by a government agency, is the resulting taking measured by regulatory taking standards (as held below) or is it more aptly "characterized as a physical invasion" (as held in a decision of the U.S. Court of Federal Claims, applying *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978))?

2. When regulatory action denies property owners the use of the substantial bulk of their land by denying them use of their own water rights—necessary for irrigation in the arid California climate—has there been a denial of "all economically viable or productive or beneficial use" even though a small portion of the land can still be used? Does such a denial unconstitutionally interfere with the owners' "distinct, investment-backed expectations" for use of the land which is, and always has been, agricultural? What are the standards for litigating each issue?

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2, Pacific Legal Foundation (PLF)[1] submits this brief *amicus curiae* in support of Allegretti & Company's petition for a writ of *certiorari*. Written consent for amicus participation in this case was granted by counsel of record for all parties. Letters of consent have been lodged with the clerk of the Court.

PLF is the largest and most experienced nonprofit, public-interest law foundation of its kind in the United States, incorporated for the purpose of litigating in the public interest. For more than 30 years, PLF has been litigating in support of the rights of individuals to make reasonable use of their private property free of unnecessarily intrusive government interference, and has advocated in favor of maintaining a reasonable balance between government efforts to protect the environment and the other necessary and proper functions of government and of free society. PLF supports the concept of limited government, the maintenance of an appropriate balance between federal and state power, and the principle that the environment must be protected in a manner that is consistent with the other needs of American society.

PLF attorneys have on several occasions appeared before this Court to interpret and defend property rights protected by the United States Constitution. PLF attorneys were counsel of record in landmark property rights cases before this Court, including *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

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[1] Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

This case has tremendous implications for the ability of Californians and residents of other arid states to invest in and ensure a stable supply of groundwater. Without adequate protection for property rights in groundwater, this resource will become increasingly insecure—at a time when reliance upon groundwater as a fundamental water source, and thus the need of a secure supply, is both significant and growing.

Groundwater—and the rights to use groundwater for agricultural, industrial, recreational, household, or other purposes—is a matter of great moment in the arid American West. In California, for instance, groundwater constitutes about 30 percent of the state's water supply, rising to 60 percent in some areas. *See* California Department of Natural Resources, *California's Groundwater*, Bulletin 118: 2003 Update, at 2. Some 40 to 50 percent of Californians rely on groundwater as part of their water supply. *Id.* An estimated 14.5 million acre-feet of groundwater were extracted in California in 1995 for these productive purposes. *Id.* at 20. And this use is growing; in the 14 years between 1987 and 2003, an average of more than 9,000 wells per year were constructed, reconditioned, or deepened. *Id.* at 27.

In submitting this brief in support of Petitioner's request that this Court grant *certiorari*, PLF addresses only the first of the two questions presented to this Court—whether the County's restriction on Allegretti's pumping activities worked a physical taking of his water rights. It takes no position herein with regard to whether the County's restrictions also worked a regulatory taking of the water rights.

SUMMARY OF THE ARGUMENT

Pursuant to a county ordinance, Imperial County, California, restricted Allegretti & Company's (Allegretti's) established usufruct right to water property and its right to occupy its subjacent property. Allegretti sued, alleging inverse condemnation on both physical and regulatory takings theories.

A California state court of appeal concluded that the ordinance, which restricted the amount of groundwater Allegretti could extract from beneath its property to 12,000 acre/feet per year, was not a compensable taking under either theory. The Supreme Court of California declined to review that decision.

In reaching its conclusion, the court of appeal unduly limited the application of this Court's physical-takings decisions. It then concluded that the County's restrictions on Allegretti's groundwater-pumping operations did not constitute a physical taking.

In fact, the court's decision directly conflicts with this Court's holdings in cases including *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), *Dugan v. Rank*, 372 U.S. 609 (1963), *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958), and *International Paper Co. v. United States*, 282 U.S. 399 (1931). When the holdings of those cases are applied to the facts at bar, it becomes clear that the County's actions effected a physical taking of Allegretti's property rights. In particular, the County prohibited extraction and beneficial use of groundwater in excess of 12,000 acre/feet per year—despite the fact that the California Constitution and settled law protect Allegretti's right to put this water to beneficial use. In finding that no physical taking had occurred, the court of appeal's decision conflicts with the teachings of this Court, and works a violation of Allegretti's Fifth Amendment right to compensation for government taking of private property.

In addition to the conflicts created by the decision below, this case presents questions of national importance, namely, the extent to which government can deprive property owners from full use of the groundwater beneath the land. Farmers, municipalities, water agencies, developers, environmental interests, and all other water users rely on set and stable rules

governing water management. Especially where water is scarce —as in many parts of California and other Western states— these set and stable rules are necessary for the most efficient and rational use of the commodity. This Court should grant certiorari to establish a foundation of secure and stable water—access rights and the corollary requirement of prompt payment of just compensation for governmental taking of those rights. Specifically, this Court should grant certiorari to confirm that the government cannot abrogate property rights established under state law. In other words, government cannot acquire water flowing beneath private property, by means of restricting the property owner's water extraction rights, without paying just compensation.

Because the California court "decided an important federal question in a way that conflicts with relevant decisions of this Court," in a matter of significant constitutional, legal, and practical importance that puts a vital liberty interest at stake, compelling reasons exist for this Court to grant *certiorari*. Supreme Court Rule 10(c).

ARGUMENT: THE *ALLEGRETTI* DECISION CONFLICTS WITH THIS COURT'S DECISIONS BY HOLDING THAT THE COUNTY DID NOT TAKE ALLEGRETTI'S WATER RIGHTS

This Court should grant *certiorari* in this matter because the California court's decision in *Allegretti & Co. v. County of Imperial*, 138 Cal. App. 4th 1261 (2006), conflicts with a series of decisions by this Court in its conclusion that Imperial County did not effect a physical taking of Allegretti's water rights.[2]

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[2] The treatment of water rights under the Takings Clause is the subject of increasing controversy. *See, e.g., Tulare Lake Basin Water Storage District v. United States*, 49 Fed. Cl. 313, 314-15, 318-20 (2001) (recognizing a compensable physical taking when (continued...)

In California, a property owner enjoys a right to extract groundwater underlying the ground that he owns. These overlying groundwater rights are usufructuary, in that they confer " 'the legal right to use the water that is superior to all other users.' " *Allegretti*, 138 Cal. App. 4th at 1271 n.5 (quoting *City of Barstow v. Mojave Water Agency*, 5 P.3d 853, 860 (Cal. 2000)). When municipalities use groundwater they do so as appropriators, and as such their rights are strictly measured by the law governing appropriators. *See Orange County Water Dist. v. City of Riverside*, 343 P.2d 450, 464 (Cal. Ct. App. 1959). Thus, when a county commandeers groundwater for its own purposes, as against the intended use by an overlying owner, it interferes with the water rights of a superior user.

The court below found no compensable taking of Allegretti's water rights to result from the County's restriction on Allegretti's pumping efforts. This finding conflicts with this Court's physical takings cases, the application of which would result in a finding that the County had worked a physical taking of Allegretti's property right to use the groundwater under its soil for its own beneficial purposes. Essentially, the California

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[2] (...continued)
federal government restricted a storage district's property right to use waters in order to protect endangered species); *Hage v. United States*, 51 Fed. Cl. 570, 572-74, 584 (2002) (finding a compensable physical taking because the government denied plaintiffs access to their vested water rights in waters surrounded by federal lands); *Klamath Irrigation District v. United States*, 67 Fed. Cl. 504, 538 (2005) (finding *Tulare Lake* wrong in some relevant respects); Jesse W. Barton, *Tulare Lake Basin Water Storage District v. United States: Why It Was Correctly Decided and What This Means for Water Rights*, 25 Environs Envtl. L. & Pol'y J. 109 (2002) (supporting *Tulare Lake*); Melinda Harm Benson, *The Tulare Case: Water Rights, the Endangered Species Act, and the Fifth Amendment*, 32 Envtl. L. 551 (2002) (opposing *Tulare Lake*).

court held that *no* taking of a usufruct right in California works a physical taking. This conclusion, too, conflicts with this Court's precedent.

The decision below purports to rely on this Court's precedent in its conclusion that the County's restrictions do not work a physical taking of Allegretti's water rights.

The facts at bar, though, are materially indistinguishable from the facts of this Court's physical invasion cases. For example, in *Dugan v. Rank*, 372 U.S. 609, this Court found that the federal government had effected a taking when it extinguished the use rights of various water districts by diminishing their access to the water of the San Joaquin River by collecting it behind Friant Dam. *See Dugan*, 372 U.S. at 613-14. The *Dugan* Court explained that

> [t]he right claimed here is to the continued flow of water . . . and to its use[.] A seizure of water rights need not necessarily be a physical invasion of land. . . . Interference with or partial taking of water rights in the manner it was accomplished here might be analogized to interference or partial taking of air space over land [Citations omitted.] Therefore, when the Government acted here with the purpose and effect of subordinating the respondents' water rights to the Project's uses whenever it saw fit, with the result of depriving the owner of its profitable use, there was the imposition of such a servitude as would constitute an appropriation of property for which compensation should be made.

Id. at 625 (internal quotation marks and parentheses omitted).

In this case, as in *Dugan*, the government impounded water, thus cutting off water-right holders' access to the flow of the relevant water in order to make some other use of it. The only distinction, as discussed *infra*, is that in the case at bar the

County has added insult to injury by impounding the water *on the usufruct right-holder's own land.*

The court below, however, rejected this straightforward result. It rightly noted that in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, this Court considered the limited context in which a government's restriction of a property owner's usufruct rights in its subjacent property would not give rise to just-compensation liability. The lower court's conclusion that the facts at bar constitute such an instance, however, conflicts with this Court's actual holdings in *Loretto* and other relevant cases. In *United States v. Central Eureka Mining Co.*, 357 U.S. 155, reviewed and relied upon in *Loretto*, this Court found no taking where the Government had issued a wartime order requiring nonessential gold mines to cease operations for the duration of the Second World War, for the purpose of conserving equipment and manpower for use in mines more essential to the war effort.

As the *Central Eureka* decision explained, the directive that temporarily closed the mines arose because

> the WPB [War Production Board] made a reasoned decision that, under existing circumstances, the Nation's need was such that the unrestricted use of mining equipment and manpower in gold mines was so wasteful of wartime resources that it must be temporarily suspended. . . . In the context of war, we have been reluctant to find that degree of regulation which, without saying so, requires compensation to be paid for resulting losses of income. The reasons are plain. War, particularly in modern times, demands the strict regulation of nearly all resources. *It makes demands which otherwise would be insufferable.* But wartime economic restrictions, *temporary in character*, are insignificant when compared to the widespread uncompensated

> loss of life and freedom of action which war traditionally demands.

Central Eureka, 357 U.S. at 168 (emp. added; citations omitted). As the *Loretto* Court summarized, "the temporary though severe restriction on *use* of the mines was justified by the exigency of war." *Loretto*, 458 U.S. at 432.

While this Court may have tightened the requirements to claim a physical takings during wartime, the California court found no taking where the County has no such exigency.

Similarly, this Court found no physical taking in *Central Eureka* because the restriction against mining the gold was temporary. The California court, to the contrary, excused the *permanent* restrictions by the County. And the gold in Central Eureka's mines was not lost as a result of the WPB's mining restrictions; it was simply left in place for the duration of the war. The water that Allegretti has been restricted from bringing to the surface, however, is lost to Allegretti forever. Unlike the deposit of gold in a gold mine, which can be mined at a later date, the flow of water from an aquifer cannot be pumped in the future.

It follows that a temporary restriction in *Central Eureka* of the extractive right to use gold in a gold mine is *less* problematic, not more, than even a temporary restriction of that same extractive right in an aquifer.

The *Allegretti* court's remaining justifications for its no-taking conclusion are equally at odds with this Court's instruction, and the conflict is apparent on the face of the court's own opinion. It asserted that "our highest court has found a physical taking" of water rights "where the government diverted water for its own consumptive use or decreased the amount of water accessible by the owner of the water rights." *Allegretti*, 138 Cal. App. 4th at 1273. The court made no effort to deny that the County's actions "decreased the amount of

water accessible by" Allegretti, which under this Court's doctrine makes this a case of physical taking.

Moreover, by application of this Court's doctrine, the County also did "divert[] water for its own consumptive use" by diverting the water from Allegretti's planned stream (i.e., through the refurbished pump and onto its property as irrigation water) for its own use (i.e., keeping the water in the ground). In *Dugan*, 372 U.S. at 613-14, the government caught water behind a dam, diverting it. In *International Paper Co. v. United States*, 282 U.S. at 406, the government's diversion arose from the issuance of an order that allowed a power plant to draw the whole of a river's flow. This was to the detriment of a paper mill that held rights to take some of that flow, while the government stood to gain some collateral benefit from increasing the power plant's draw. The facts here are analogous: the County has issued an order that curtails Allegretti's ability to draw water to which it has a right. And while the government will not physically "use" the water (in the same way that the *government* did not use the water in *International Paper*), the water is being put to a use that the government desires. Under this Court's precedent, then, the County has "diverted for its own consumptive use."[3] By

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[3] The court cannot be asserting that the County avoids responsibility for having effected a physical taking because the County's use of the water is wholly unproductive and not economically beneficial. This purposelessness could hardly *insulate* the County's conduct in California, given that the state-constitutional protection of usufruct water rights *requires* that water be put to productive use. *See* Cal. Const. art. X, § 2 ("[T]he general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable . . . ."). And this would make for very bad doctrine indeed: if government restrictions on property use are purposive, they may be takings; but if they are arbitrary and unexplained, they are not.

reaching the contrary conclusion, the California court's decision conflicts with this Court's holding.

After conflicting with this Court's holdings in its reasoning, the court below similarly conflicted with this Court in its conclusion.

> County's action with respect to Allegretti in the present case—imposition of a permit condition limiting the total quantity of groundwater available for Allegretti's use—cannot be characterized as or analogized to the kinds of permanent physical occupancies or invasions sufficient to constitute a categorical physical taking. The County did not physically encroach on Allegretti's property or aquifer and did not require or authorize any encroachment (e.g. *Yee v. City of Escondido, supra,* 503 U.S. 519, 527, 112 S. Ct. 1522); it did not appropriate, impound or divert any water. The County's permit decision does not effect a *per se* physical taking under any reasonable analysis.

Allegretti, 138 Cal. App. 4th at 1273.

As an initial matter, a sound argument can be made that the County's actions did permanently physically encroach upon and invade Allegretti's subjacent estate. Water in California (as distinguished from the *use* of water) is publicly owned. *See Allegretti*, 138 Cal. App. 4th at 1271 n.5 (quoting *Mojave Water Agency*, 5 P.3d at 860; *Central and West Basin Water Replenishment Dist. v. Southern Cal. Water Co.*, 109 Cal. App. 4th 891, 905 (2003)). By refusing to permit Allegretti to remove the publicly owned water in excess of 12,000 acre/feet per year from the subjacent part of Allegretti's property, the County ensured that the public's water would permanently encroach upon that property. Moreover, *Dugan* demonstrates plainly that physical occupations, invasions or encroachments

are wholly unnecessary to the finding of a *per se* taking. *See, supra*, at 6-7.

Thus the court's sole remaining explanation of why the County's actions did not work a physical taking of Allegretti's usufruct water rights is that the County "did not appropriate, impound or divert any water." In fact, however, the County did *impound* the groundwater in the ground, proscribing its removal to a different locale. For all practical purposes, this impoundment *diverted* the water from Allegretti's intended beneficial use (irrigation). It worked a legal diversion that is functionally indistinguishable, from Allegretti's perspective, from the diversions of water away from the owners of the water rights at issue in *Dugan* and *International Paper*. And as in those cases, the effect of the County's action here was to *appropriate* the diverted water for the use that it, the government diverter, preferred—here, keeping it in the ground. *See, e.g.*, *Dugan*, 372 U.S. at 613-14; *Int'l Paper*, 282 U.S. at 406. Once again, then, the California court's conclusion that the County's restriction on Allegretti's pumping activities did not work a physical taking places it at odds with this Court.

A faithful application of this Court's precedent to the facts below requires a finding that the County's action worked a physical taking of Allegretti's usufruct groundwater rights. To achieve the contrary result, the court below repeatedly conflicts with that precedent. Most starkly, the *Allegretti* court's decision, if allowed to stand by this Court, will establish the proposition in California that there is simply no such thing as a physical taking of a usufruct right. Because all usufruct rights are by definition rights to use, and because, by the *Allegretti* court's definition, *Allegretti*, 138 Cal. App. 4th at 1271-74, restrictions of use rights are "regulations," all denials of usufruct rights are, at most, regulatory takings. Because this proposition stands in square opposition to the holdings of *Loretto*, *Dugan*, and a host of other decisions of this Court, and would greatly diminish the liberties protected by the Fifth

Amendment of the United States Constitution, Amicus PLF urges the Court to grant *certiorari*.

CONCLUSION

Beneficial use of water becomes an ever-increasingly important public-policy goal as the pressures on American, and particularly western, water resources increase. Property rights, especially property rights to the use of water itself, are an important safeguard of and incentive to efficient beneficial use; confusion about the extent and efficacy of usufruct water rights can only endanger the goal of wise and beneficial use. The California court's decision reaches conclusions about both real-property rights and usufruct water rights that are at odds with the very body of this Court's property-right precedent upon which it purports to rely. This case represents an important opportunity for the Court to elaborate vital doctrines of property and water law. This Court should grant Allegretti's petition for *certiorari*.

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